

#### § 35.937-9

contract. Unsuccessful candidates should be notified promptly.

#### § 35.937-9 Required solicitation and subagreement provisions.

(a) *Required solicitation statement.* Requests for qualifications or proposals must include the following statement, as well as the proposed terms of the subagreement.

Any contract awarded under this request for (qualifications/professional proposals) is expected to be funded in part by a grant from the United States Environmental Protection Agency. This procurement will be subject to regulations contained in 40 CFR 35.936, 35.937, and 35.939. Neither the United States nor the United States Environmental Protection Agency is nor will be a party to this request for (qualifications/professional proposals) or any resulting contract.

(b) *Content of subagreement.* Each subagreement must adequately define:

- (1) The scope and extent of project work;
- (2) The time for performance and completion of the contract work, including where appropriate, dates for completion of significant project tasks;
- (3) Personnel and facilities necessary to accomplish the work within the required time;
- (4) The extent of subcontracting and consultant agreements; and
- (5) Payment provisions in accordance with § 35.937-10.

If any of these elements cannot be defined adequately for later tasks or steps at the time of contract execution, the contract should not include the subsequent tasks or steps at that time.

(c) *Required subagreement provisions.* Each consulting engineering contract must include the provisions set forth in appendix C-1 to this subpart.

#### § 35.937-10 Subagreement payments—architectural or engineering services.

The grantee shall make payment to the engineer in accordance with the payment schedule incorporated in the engineering agreement or in accordance with paragraph 7b of appendix C-1 to this subpart. Any retainage is at the option of the grantee. No payment request made by the Engineer under the agreement may exceed the esti-

#### 40 CFR Ch. I (7-1-10 Edition)

mated amount and value of the work and services performed.

#### § 35.937-11 Applicability to existing contracts.

Some negotiated engineering subagreements already in existence may not comply with the requirements of §§ 35.936 and 35.937. Appendix D to this subpart contains EPA policy with respect to these subagreements and must be implemented before the grant award action for the next step under the grant.

#### § 35.937-12 Subcontracts under subagreements for architectural or engineering services.

(a) Neither award and execution of subcontracts under a prime contract for architectural or engineering services, nor the procurement and negotiation procedures used by the engineer in awarding such subcontracts are required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.937 except as provided in paragraphs (b), (c), and (d) of this section.

(b) The award or execution of subcontracts in excess of \$10,000 under a prime contract for architectural or engineering services and the procurement procedures used by the engineer in awarding such subcontracts must comply with the following:

- (1) Section 35.936-2 (Grantee procurement systems; State or local law);
- (2) Section 35.936-7 (Small and minority business);
- (3) Section 35.936-15 (Limitations on subagreement award);
- (4) Section 35.936-17 (Fraud and other unlawful or corrupt practices);
- (5) Section 35.937-6 (Cost and price considerations);
- (6) Section 35.937-7 (Profit);
- (7) Prohibition of percentage-of-construction-cost and cost-plus-percentage-of-cost contracts (see § 35.937-1); and
- (8) Applicable subagreement clauses (see appendix C-1, clauses 9, 17, 18; note clause 10).

(c) The applicable provisions of this subpart shall apply to lower tier subagreements where an engineer acts as

## Environmental Protection Agency

## § 35.938-4

an agent for the grantee under a management subagreement (see § 35.936-5(b)).

(d) If an engineer procures items or services (other than architectural or engineering services) which are more appropriately procured by formal advertising or competitive negotiation procedures, the applicable procedures of § 35.938 or of part 33 shall be observed.

### § 35.938 Construction contracts (subagreements) of grantees.

#### § 35.938-1 Applicability.

This section applies to construction contracts (subagreements) in excess of \$10,000 awarded by grantees for any step 3 project.

#### § 35.938-2 Performance by contract.

The project work shall be performed under one or more contracts awarded by the grantee to private firms, except for force account work authorized by § 35.936-14.

#### § 35.938-3 Type of contract.

Each contract shall be a fixed price (lump sum or unit price or a combination of the two) contract, unless the Regional Administrator gives advance written approval for the grantee to use some other acceptable type of contract. The cost-plus-percentage-of-cost contract shall not be used in any event.

#### § 35.938-4 Formal advertising.

Each contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with § 35.936-18. Formal advertising shall be in accordance with the following:

(a) *Adequate public notice.* The grantee will cause adequate notice to be given of the solicitation by publication in newspapers or journals of general circulation beyond the grantee's locality (statewide, generally), inviting bids on the project work, and stating the method by which bidding documents may be obtained or examined. Where the estimated cost of step 3 construction is \$10 million or more, the grantee must generally publish the notice in trade journals of nationwide distribution. The grantee should, in addition,

solicit bids directly from bidders if it maintains a bidders list.

(b) *Adequate time for preparing bids.* Adequate time, generally not less than 30 days, must be allowed between the date when public notice under paragraph (a) of this section is first published and the date by which bids must be submitted. Bidding documents (including specifications and drawings) shall be available to prospective bidders from the date when such notice is first published.

(c) *Adequate bidding documents.* The grantee shall prepare a reasonable number of bidding documents (invitations for bids) and shall furnish them upon request on a first-come, first-served basis. The grantee shall maintain a complete set of bidding documents and shall make them available for inspection and copying by any party. The bidding documents shall include:

(1) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule. (Drawings and specifications may be made available for inspection and purchase, instead of being furnished.);

(2) The terms and conditions of the contract to be awarded;

(3) A clear explanation of the method of bidding and the method of evaluation of bid prices, and the basis and method for award of the contract;

(4) Responsibility requirements or criteria which will be employed in evaluating bidders;

(5) The following statement:

Any contract or contracts awarded under this invitation for bids are expected to be funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is or will be a party to this invitation for bids or any resulting contract. This procurement will be subject to regulations contained in 40 CFR 35.936, 35.938, and 35.939.;

and

(6) A copy of §§ 35.936, 35.938, and 35.939.

(d) *Sealed bids.* The grantee shall provide for bidding by sealed bid and for the safeguarding of bids received until public opening.